

STATE OF MICHIGAN
COURT OF APPEALS

AUDREY BELL, LEO BEASLEY, BRENDA
BLACK, KIMBERLY BLEVINS, KATHLEEN
CONQUEST, VERONICA DORSETTE, LINDA
FACEY, JAYNE FLOYD, GRACE JENNINGS,
MARY OLIVER, TERRI SUTTON, ANGELA
TURNER, and ALCITA WILLIAMS,

Plaintiffs-Appellees,

v

MICHIGAN COUNCIL 25 OF THE AMERICAN
FEDERATION OF STATE, COUNTY, AND
MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL
1023,

Defendants-Appellants,

and

DENTRY BERRY and STEVEN MALACH,
personal representative of the ESTATE OF
YVONNE BERRY, deceased,

Defendants.

UNPUBLISHED
February 15, 2005

No. 246684
Wayne Circuit Court
LC No. 01-107819-NO

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

MURRAY, J. (*dissenting*)

This is a difficult case, in the sense that the precise issue has not been squarely addressed by any court of this state, nor in any other as far as our research reveals. Yet, it is precisely because there are no such cases on this issue that makes this case easy to resolve. For, in my view, this case does not survive scrutiny under general premises liability cases, and our Court should not expand general negligence law to cases such as this when neither the Legislature nor the Supreme Court have done so. Accordingly, and for the reasons outlined below, I would reverse the judgment and remand for entry of an order granting defendant's motion for a directed verdict.

Throughout the case, plaintiffs have prosecuted their case as a negligence claim, while recognizing that defendant's duties are analogous to that of a premises owner. As both parties recognize, under Michigan law a premises owner has a very limited duty when it comes to protecting against criminal acts of third parties. In *Graves v Warner Bros*, 253 Mich App 486; 656 NW2d 195 (2002), we thoroughly examined the law regarding the duty of a premises owner to protect against the criminal acts of a third party. There, we noted that to maintain a negligence claim there must be a legal duty requiring defendant to conform to a particular standard of conduct in order to protect others against an unreasonable risk of harm. *Graves, supra* at 492. To do so, courts must determine if such a duty should be placed upon an actor, which necessitates an evaluation of several factors. *Id.* at 492-493.

Important for purposes of *Graves*, as well as this case, was the general principle that "there is no legal duty obligating one person to aid or protect another." *Id.* at 493. Additionally, because criminal activity is normally unforeseeable, "an individual has no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and the third party." *Id.*

Thus, if there is no special relationship between plaintiffs and defendant, there is no duty placed upon defendant to protect plaintiffs from the criminal acts involved in this case. However, assuming the union-union member relationship constitutes a special relationship, the duty to protect placed upon defendant does not extend so far to protect plaintiffs from the criminal acts involved in this case.

In *Graves*, we examined the limited duty placed on a premises owner to protect specific persons from criminal acts. In doing so, we relied upon *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001), where our Supreme Court outlined the limited duties of protection placed on the premises owner (a merchant) who had a special relationship to another (the customer):

To summarize, under *Mason [v Royal Dequindre, Inc*, 455 Mich 391; 566 NW2d 199 (1997), overruled in part by *MacDonald, supra*], generally merchants "have a duty to use reasonable care to protect their identifiable invitees from the foreseeable criminal acts of third parties." *Id.* at 405. The duty is triggered by specific acts occurring on the premises that pose a risk of imminent and foreseeable harm to an identifiable invitee. Whether an invitee is readily identifiable as being foreseeably endangered is a question for the factfinder if reasonable minds could differ on this point. See *id.* at 404-405. *While a merchant is required to take reasonable measures in response to an ongoing situation that is taking place on the premises, there is no obligation to otherwise anticipate the criminal acts of third parties.* Consistent with *Williams*, *a merchant is not obligated to do anything more than reasonably expedite the involvement of the police.* We also reaffirm that a merchant is not required to provide security guards or otherwise resort to self-help in order to deter or quell such occurrences. *Williams [v Cunningham Drug Stores, Inc*, 429 Mich 495; 418 NW2d 381 (1988)]. [*MacDonald, supra* at 338 (emphasis added).]

In *Graves*, we summarized this duty, which is limited to only contacting the police when faced with a risk of imminent and foreseeable harm to invitees:

MacDonald confirms the long-established rule that there is no general duty to anticipate and prevent criminal activity even where, unlike the present case, there have been prior incidents and the site of the injury is a business premises. Any duty is limited to reasonably responding to situations that occur on the premises and pose a risk of imminent and foreseeable harm to identifiable invitees, and the duty to respond is limited to contacting the police. [*Graves, supra* at 497.]

Under the duty imposed upon merchants by *MacDonald*, *Graves*, and other cases, defendant in this case had no duty to protect plaintiffs' social security numbers. It is undisputed that no one was aware of Dentry Berry's criminal intentions or acts until after they had occurred. Thus, there was no opportunity to reasonably respond by contacting the police. And, because plaintiffs are not alleging that defendant failed to take reasonable action after the criminal acts were discovered, defendant simply had no duty to act.

Additionally, the evidence that years before the incident occurred there was concern that the information could be released to the public when Berry took documents home is not enough to impose liability on defendant. As the *MacDonald* Court aptly stated, "[s]ubjecting a merchant to liability solely on the basis of a foreseeability analysis is misbegotten. Because criminal activity is irrational and unpredictable, it is in this sense invariably foreseeable everywhere." *MacDonald, supra* at 335.

The holdings of *MacDonald* and *Graves* cannot be cast aside on the basis that *MacDonald* involved merchant-invitee liability, and this case involves relinquishing control of private information to defendant. Plaintiffs have postured this case under a negligence theory, and the information was taken as a result of a criminal act. Thus, as plaintiffs seem to concede, we must apply the *MacDonald* analysis because it is the only analysis involving the duty element of a negligence claim as it relates to a criminal act.

Moreover, policy implications warrant against this Court imposing a duty on defendant. Although upholding the verdict would not necessarily result only through the creation of a new cause of action, it undoubtedly does extend negligence into a new realm. This is an area of law, both civil and criminal, that is gaining nationwide attention by state legislatures and Congress. Indeed, the Governor recently signed into law numerous enrolled bills that address identity theft issues. In particular, 2004 PA 454, entitled the Social Security Number Privacy Act, creates new obligations and restrictions on the use of social security numbers, including a requirement that businesses create privacy policies,¹ and creates civil² and criminal liability³ for violations of the Act.

¹ See Sec. 4(1)(a)-(c).

² See Sec. 6(2)

³ See Sec. 6(1)

Although 2004 PA 454 is effective March 1, 2005, and thus affords no relief to these plaintiffs, we should restrain ourselves from creating liability in an area where no precedent exists for doing so and the Legislature has acted to fill any gap in this new area of law. See, e.g., *Koester v VCA Animal Hosp*, 244 Mich App 173, 176-177; 624 NW2d 209 (2000). I would therefore vacate the jury verdict and remand for entry of an order granting defendant's motion for a directed verdict.

/s/ Christopher M. Murray